BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	MM Docket No. 98-204
Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies	)	

To: The Commission

JOINT REPLY COMMENTS OF THE NAMED STATE BROADCASTERS ASSOCIATIONS

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May 29, 2002

EXECUTIVE SUMMARY

The broadcast industry is on record as strongly opposing unlawful discrimination in employment. Moreover, even in the absence of FCC EEO rules eliminated in the wake of court decisions over the past three years, the nation's broadcasters have continued broad outreach efforts designed to attract and develop talent and find *real jobs for real people.* In an increasingly multi-racial, multi-ethnic and multicultural America, efforts at inclusion are a business necessity. Indeed, many civil rights groups commenting in this proceeding have noted the progressive accomplishments of today's broadcasting industry.

Given this record, the Associations find no factual or legal basis for re-regulating. Neither the FCC nor re-regulation advocates have demonstrated, nor can they demonstrate, that today's broadcasting industry is discriminating and, as a result, the FCC cannot single out this industry for regulation. Neither the FCC nor re-regulation advocates have placed current or recent data on the record that is able to support the stated rationale for re-regulation: that EEO rules are required to prevent allegedly homogenous workforces from replicating themselves to the detriment of minorities and women. The record is devoid of evidence that homogenous workforces exist, let alone that they self-replicate. Without a legitimate rationale for separate, burdensome re-regulation, the FCC should instead rely on anti-discrimination laws that apply to all employers to deal with the occasional bad actor and, if appropriate, after adjudication, take action under its character policy.

The Associations note again that without evidence demonstrating a discrimination problem in the broadcasting industry, the re-regulation proposed would be arbitrary and capricious. Moreover, any enforcement mechanism that requires stations to file publicly-available reports on the makeup of their workforces would violate constitutional equal protection provisions in the Fifth Amendment. Because these kind of reports have been used in the past and

will be used in the future by either the FCC or outside groups to pressure broadcasters to maintain a particular racial, ethnic or gender profile among their employees, such reports would be clearly unconstitutional.

Although the Associations believe the FCC should not re-regulate, if it chooses to impose new EEO rules, it must not implement regulations that are likely to be overturned in court, as has occurred twice in the past three years. To meet this challenge, the Associations have proposed an Internet-centered approach that will ensure broad outreach so that everyone interested in a broadcasting career will have easy access to the information needed to apply for jobs in the industry. Under this proposal, each station would be required to post at least 50 percent of its job openings on a website. This proposal also includes provisions for promotion of the Internet sites at which broadcasting job listings may be found, as well as continued outreach and promotion of job listings sent to outside referral organizations, many of which are in the civil rights community.

Statistics indicate the growth in Internet use is on such an upward trajectory that the idea of a digital divide is becoming as outmoded as fears of a Soviet threat. Americans of all races and ethnicities are going online at home, at work, at public libraries and community centers or, if in need of help finding a job, at state employment service offices all over the country. If the Commission's goal is truly to have the widest possible outreach, it will endorse such broad Internet-centered recruitment because it meets the need for wide dissemination of job postings.

Ultimately, for regulation to be legally supportable, it must reflect the realities of the industry today. An Internet-centered program to disseminate job information, with its easy access and wide reach, will achieve, through constitutionally-permissible means, the goals of broad outreach and finding *real jobs for real people.*

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The Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Maryland/DC/Delaware Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters,

Radio Broadcasters Association of Puerto Rico, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and the Wyoming Association of Broadcasters (collectively, the "Associations"), by their attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§1.415, 1.419, hereby jointly reply to comments (these "Joint Reply Comments") filed in response to the *Second Notice of Proposed Rule Making* (the "*Second NPRM*"), 67 Fed. Reg. 1704 (January 14, 2002) in the above-captioned proceeding. These Joint Reply Comments, submitted to the Commission on May 29, 2002, are timely filed by virtue of the extension of time granted by Order of the Commission adopted February 20, 2002 and released May 1, 2002 (DA 02-1007).

INTRODUCTION

The Joint Comments filed initially by the Associations (the "Associations' Comments") and by most other commenters in this Rule Making demonstrate fundamental agreement with the Associations' basic premise that illegal employment discrimination is noxious and intolerable. The comments filed also demonstrate that the Internet has become an effective and crucial job-hunting and recruitment tool, providing unprecedented reach in the dissemination of information to job-seekers across the country.

Substantive disagreements remain, however, over the role the FCC should play in equal employment opportunity. The facts and the law substantiate the Associations' position that grave doubt exists concerning the FCC's authority to re-regulate in this area. If the FCC is nonetheless inclined to adopt new EEO rules, such regulation should only impose what is

necessary to achieve broad outreach. Today, nothing can achieve broad outreach as well as the Internet. Given this reality, the Commission should disengage from its regulatory legacy of EEO supplemental initiatives and menu options. If it chooses to re-regulate, it should adopt the Associations' plan under which stations will be able to comply with their obligations by making use of the Internet's unprecedented and proven recruiting outreach ability.

These Joint Reply Comments ("Associations' Reply") are designed to correct the record insofar as it contains misinformation about the law, about the current state of the broadcasting industry, and the virtues of Internet-centered recruiting. If the Commission looks at both the facts and the law as they exist *today*, it will either decline to re-regulate or, at a minimum, allow stations to meet their obligations by tapping the ubiquitous recruiting power of the Internet. This rubric presents the only means by which the Commission has any real hope to avoid having a court again intervene to eliminate EEO rules as either arbitrary and capricious or unconstitutional – or both.

DISCUSSION

I. Many Commenters, Including Civil Rights Groups, Have Noted the Progressive Accomplishments by Today's Broadcast Industry in Equal Employment Opportunity and, as a Result, Have Endorsed Many of The Associations' Core Positions and Current Job Search/Recruitment Activities

The Associations are pleased that so many commenters, including civil rights organizations, have noted the progressive accomplishments by today's broadcast industry in fostering equal employment opportunity. These efforts have continued even in the absence of FCC-related EEO regulations, which have twice been overruled in the past three years through judicial review. The Associations agree with certain comments filed by the coalition led by the Minority Media & Telecommunications Council ("MMTC") insofar as they state: "Broad

recruitment is widely endorsed and accepted."[1] The broadcasting industry likewise operates from this basic premise. Broadcasters' goals are the same as MMTC's: to broadly reach "qualified persons"[2] with job postings. As a talent-dependent business, broadcasting needs such wide outreach to remain effective in an increasingly competitive media marketplace.

Several commenters have noted, as did the Associations, that the Internet has become a job searching and employer recruiting tool of unprecedented power and reach, making it a crucial element for job searching and wide recruiting.[3] The National Organization for Women[4] ("NOW"), for instance, endorsed the position espoused by the Associations that job-seekers gain better access through centralized web-based media job portals and, therefore, if the FCC re-regulates, the ensuing rules should encourage use of such centralized web sites.[5] The value of such Internet-centered recruiting has been most recently proven by the Federal Government itself, which held its first online job fair in April, 2002. Over the course of a five-day work week, the Office of Personnel Management reported that the online job fair web site "garnered at least 1.8 million hits and more than 20,000 applications" for 250 job openings.[6] Statistics such as these underscore the Associations' position that the Internet can lead to broad outreach more

1 *Comments of EEO Supporters ("MMTC Comments")*, filed Apr. 15, 2002, at 16.

2 *Id.* at 86.

3 *See, e.g., Comments of American Women in Radio Television* ("AWRT"), filed Apr. 15, 2002, and *Comments of National Organization for Women, et al* ("NOW"), filed Apr. 15, 2002.

4 Joining NOW in filing its comments were: the NOW Legal Defense and Education Fund, the Feminist Majority Foundation, the Philadelphia Lesbian and Gay Task Force, and the Women's Institute for Freedom of the Press.

5 NOW Comments at 7.

6 *Virtual job fair nets 1.8 million hits, 20,000 applications*, Federal Human Resources Week, Vol. 9, No. 5, May 13, 2002.

effectively and efficiently than any method – by a wide margin.

While the Associations have taken steps, both in each state[7] and nationally, to create Internet-centered job search and recruiting opportunities, the Associations reiterate their belief that the FCC should also provide such a centralized portal that would allow those seeking jobs to participate in an ongoing, online broadcasting career fair – not unlike the virtual job fair that was so wildly successful for the Federal Government itself.

The Associations are also gratified that NOW[8] and American Women in Radio and Television ("AWRT")[9] have endorsed other kinds of recruiting efforts already undertaken by the Associations and their members to increase the effectiveness of their Internet outreach efforts. These include the use of on-air promotions to direct broadcast job-seekers to Internet sites and other recruiting resources, as well as partnerships with other referral organizations to increase the potential applicant pool. The NASBA CareerPage.com web contains hyperlinks to and receives site visits through hyperlinks from national referral organization web sites.[10] These national Internet-centered tools exist alongside similar partnership efforts in the several states to accomplish the ultimate goal of *finding real jobs for real people.*

II. When Accurately Stated, Both The Facts and Law Do Not Support EEO Re-regulation

The Associations are grateful that so many civil rights organizations acknowledge and are in accord with the broadcast industry on ultimate goals. But the Associations disagree with these

7 Since filing the Associations' Comments, the Utah Broadcasters Association has opened its website to job seekers. The Maryland/DC/Delaware Broadcasters Association plans to launch its web site on May 30, 2002. All other states had previously launched sites.

8 NOW Comments at 4.

9 AWRT Comments at 2.

10 *See* Associations Comments at 25-26.

groups about the appropriate and lawful means to achieve such goals. In that regard, the Associations respectfully take issue when advocates for re-regulation fail to accurately depict both the facts and the law in this area – as they stand *today*.

Re-regulation advocates rely on distant history rather than current reality to support their claims. Such a view may be understandable insofar as history is prologue, and there is no dispute about the state of race relations in the U.S. when the FCC first promulgated its own EEO rules more than three decades ago. But under well-rooted principles of administrative and constitutional law, the Commission has an obligation not to rely on an analysis that is frozen in time. When promulgating new rules, the Commission must evaluate an industry as it exists *today*. As noted in the Associations' Comments, "basic principles of administrative law require the agency to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[11] Here, this effort requires drawing conclusions about the industry from *the past three years during the periods it has operated without FCC EEO regulations*.

Given the realities of broadcasting today, neither the FCC nor re-regulation advocates have been able to articulate a legally adequate rationale supporting re-regulation.[12] In the absence of any such rationale supported by the facts, the new EEO rules proposed by the Commission and re-regulation advocates would suffer the same fate as the Commission's previous two attempts at EEO regulation. Lacking such a connection to the facts as they exist

11 *AT&T Wireless Servs. v. FCC,* 270 F.3d 959 (D.C. Cir. 2001) (citing *U.S. Telecom Ass'n v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000) and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

12 *See also* Comments of Golden Orange Broadcasting, submitted Apr. 15, 2002.

today, none of the justifications proffered insulate the proposed EEO regulations from statutory or constitutional scrutiny and rejection.

A. The Stated Justifications Are Not Legally Adequate To Support the Proposed Regulations

Proponents of re-regulation argue that the FCC should re-regulate for several reasons: (1) The FCC was allegedly complicit several decades ago with licensees who discriminated, and the supposed legacy of ongoing societal discrimination creates a need for remedial action across the broadcast industry; (2) Minorities are underrepresented among broadcast employees and, to prevent future discrimination, the Commission must control "word-of-mouth" recruiting because it inherently creates self-replicating homogeneity; (3) FCC regulations are needed to promote program diversity; and (4) FCC EEO regulations are required by statute. Each of these justifications is fatally flawed, as discussed below.

(1) Distant Historical Events Do Not Provide A Legally Sufficient Basis, by Themselves, for Re-Regulation

MMTC and other commenters suggest that the FCC once operated under the social expectations that grew out of the Jim Crow laws of the past. These re-regulation advocates claim that the Commission must put an end to the alleged "consequences of its own past ratification and validation of" discrimination.[13] In making this claim, advocates for EEO re-regulation rely on such anti-Jim Crow sources of authority as the Justice Department's 1968 "Pollack Letter," which formed the basis for the FCC's original EEO regulations in 1968 and 1969 – particularly

[13] MMTC Comments at 10-11.

the Pollack Letter's view that "the end of discrimination in broadcasting would have a pronounced ripple effect in reducing discrimination throughout society."[14] But, today, two generations removed from that historical record – and with the benefit of thirty years of broadcast-specific EEO regulation – the broadcast industry has produced, and is continuing to produce, the effect desired by the Pollack Letter. The broadcast industry *today* is engaging in widespread, non-discriminatory, vigorous, voluntary efforts to make opportunity available to all who have the desire, talent and perseverance needed for a successful broadcast career. As a result, neither the Commission nor re-regulation supporters have produced, nor can they produce, any evidence of widespread discrimination in the broadcast industry *today or in the recent past* that would require special regulation and remedies to be imposed *today.*[15]

The lack of any evidence of actual widespread discrimination is fatal to the case for re-regulation posited by MMTC and others. Lacking such empirical evidence, MMTC is left to rely solely upon its own *hypothetically derived* level of discrimination (ten percent).[16] MMTC later restates its 10 percent figure in its analysis as if, through restatement, its figure has somehow become an actual fact – and it does so without noting on such subsequent reference that the figure remains purely hypothetical and devoid of any empirical foundation.[17] Once it relies on fictional statistics, it is an easy leap for MMTC to unjustly pillory an entire industry by stating

14 *Id.* at 31.

15 Lacking evidence that it can place on the record, MMTC officials held an ex-parte meeting with Commissioner Michael Copps on April 30, 2002, at which they again restated their assertions of widespread discrimination in the broadcast industry. However, MMTC has still failed to provide record evidence to support these assertions. If MMTC provided Commissioner Copps with any information outside this record to support its assertion, it should immediately provide that information on the record.

16 MMTC Comments at 21.

17 *E.g., id.* at 43.

"unless broadcasters are the only saints in the business world, it is all but certain that hundreds (or more) broadcasters discriminate regularly."[18] The Commission, however, is duty-bound to avoid any reliance on baseless speculation. Given the demonstrable lack of evidence that a discrimination problem exists, the Commission should either decline to re-regulate or, at most, create a regulatory regime that focuses on means necessary to achieve truly broad outreach. The Association's proposed Internet-centered model would achieve this goal – and do so without risking a court challenge striking down EEO regulations as unconstitutional[19] or arbitrary and capricious,[20] as fully described in the Associations' Comments.

(a) Proposed Re-regulation Would Fail the Test of Strict Scrutiny

Both the Commission's proposals and those of re-regulation advocates would fail the constitutional test of strict scrutiny. As established in the Associations' Comments, station attributable employee profile reporting requirements (Forms 395), which remain a significant part of re-regulation proposals, would pressure broadcasters into making racially and / or ethnically conscious hiring decisions.[21] Such pressure invokes strict scrutiny, as "[a]ll governmental action based on race – a group classification long recognized as 'in most circumstances irrelevant and therefore prohibited' – should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." *Adarand Constructors v. Pena,* 515 U.S. 200, (1995) (citing *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943)).

18 *Id* at 39.

19 *See* Associations' Comments, filed Apr. 15, 2002, at 39-42.

20 *See id* at 31-34.

21 *id* at 48-51.

Lacking evidence that the broadcasting industry, standing alone, has a discrimination problem in need of remedy, re-regulation advocates base their arguments for re-imposition of these practices on the existence of societal discrimination. This is evident when MMTC alleges: "unless broadcasters are the only saints in the business world, it is all but certain that hundreds (or more) broadcasters discriminate regularly."[22] But, in considering the rules, here, the Commission should not lose sight of the Supreme Court's admonition that "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986); see *also Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (holding that a "generalized assertion that there has been past discrimination in an industry provides no guidance for a legislative body to determine the precise scope of injury it seeks to remedy. It 'has no logical stopping point.'" (*citing Wygant*, 476 U.S. at 275)). Insofar as neither the Commission nor re-regulation advocates have produced any data reflecting the current need for such race conscious regulation *in broadcasting*, the proposed re-regulation would not be rational – much less compelling, as required under strict scrutiny.

(b) The Commission Must Yield to Judicial Review

Given that its EEO regulations have been twice overruled and vacated, the Commission should decline to turn its good intentions into a run-away vehicle on a path toward a renewed Constitutional collision. Indeed, when EEO advocates suggest that the FCC should ignore the

22 MMTC Comments at 39.

D.C. Circuit Court of Appeals' prior decisions,[23] the Commission's response should be that such a course is not an available option under the law as federal agencies, such as the FCC, must yield to judicial review and the precedents set. *See Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137 (1803). Simply put: the Commission is bound by the D.C. Circuit's determinations and must abide by them.

Given this mandate, the Commission should not impose any measure that would lead to unconstitutional pressure on broadcasters to engage in race or ethnicity-conscious recruitment or hiring. Nonetheless, re-regulation advocates seek requirements that licensees file station attributed, publicly-available EEO employee profile reports (Form 395).[24] Such a requirement creates Constitutional problems because, as noted in the Associations' Comments,[25] the Commission offers no promise in this Rule Making that it will not use station-attributable data reflecting the race, ethnicity and sex of employees when making EEO enforcement decisions.

Even if the Commission were to pledge that it will not use such data in enforcement efforts, such publicly-available reports would still be available for use by private groups to pressure broadcasters to adopt race, ethnicity or gender-based hiring policies. MMTC has made it clear that it intends to use these reports to compare broadcasters' employee profiles with those of their local workforces. MMTC has stated that a difference of two standard deviations from the profile of the local market will be enough to create a "presumption of discrimination," from

23 Comments of Lawyers Committee for Civil Rights Under the Law and People for the American Way Foundation, at p.10.

24 *See, e.g.*, MMTC Comments at 122 and Letter of David Honig, Esq., May 2, 2002, disclosing contents of *ex parte* contacts with Commissioner Copps and Commission staff on Apr. 15, 2002.

25 Associations' Comments at 49-52.

which it is justified in "liberally" drawing inferences.[26] When such inferences are liberally drawn and such groups as MMTC use the data to pursue actions against broadcast employers at the Commission, it becomes a textbook case of applying illegitimate pressure. It was exactly this kind of pressure, whether applied by government regulators or by third parties, that the D.C. Circuit explicitly found unconstitutional in *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353, *reh'g denied*, 154 F.3d 487, *reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*"). Therefore, any similar regulation here, resulting in similar pressure, would be similarly unconstitutional.

Although MMTC asserts that it offers a compromise to keep station-attributed reports confidential for three years after filing,[27] this claim of compromise is mere subterfuge. Once the information is made available to private groups, unconstitutional pressures may be applied at any time – especially at license renewal time. Three years of confidentiality simply does not protect against the imposition of such unconstitutional pressure. The Commission, therefore, must not impose *any* requirement that stations file publicly available EEO compliance reports – whether the data they contain is released immediately or a few years later, lest such a scheme run afoul of the Constitutional holding of *Lutheran Church*, 141 F.3d at 353. To comply with such precedent, the Commission should, at most, impose requirements that stations certify to the facts of their EEO efforts.

26 MMTC Comments on the First *NPRM* in this proceeding (MM Docket 98-204), filed on Mar. 19, 1999 at 315 n.459.

27 Letter of David Honig, Esq., *supra* n. 24.

Moreover, as will be argued in section V, below, the Commission must not put off, as MMTC suggests, its consideration of the future use of such station-reported employee demographics because the use of such information is a key element in this rule making.

(2) Claims of Underrepresentation, and the Need to Prevent Future Discrimination Through Allegedly Self-Replicating Homogeneity Are Not Supported By Facts Or Law

In their struggle to make statistics support their arguments, many re-regulation advocates reach for statistics that do not present an accurate view of today's broadcasting industry. AWRT candidly acknowledges that 1995 statistics cited in the narrative of its comments are "somewhat dated."[28] Others offer data that are simply irrelevant to the issues at hand. Although some of the data may demonstrate continuing problems for the nation as a whole, they do not describe any problems supporting re-regulation of the broadcasting industry in particular. The Lawyers Committee for Civil Rights Under the Law and People for the American Way Foundation, in their joint comments, present statistics not about broadcast employment, but about broadcast ownership,[29] even though this rule making proceeding only concerns proposals for re-regulation of broadcast employment practices. This proceeding, then, is not the appropriate forum for analyzing ownership issues which are affected by a broader array of societal issues involving the distribution of wealth.

More accurately, statistics buried in the appendices of AWRT's comments reflect the progressive role played by today's broadcast industry in providing *equal employment*

28 AWRT Comments 3.

29 At the same, these commenters do acknowledge that minority broadcast ownership is at an all-time high, according to statistics from the year 2000.

opportunities. For instance, "[m]inorities now hold almost a quarter of all jobs in television news, the highest level ever . . . . In radio, the percentage of staffs with minorities and the percentage of the minority work force both rose from last year," noted a 2001 study of women and minorities in radio and television conducted by Ball State University.[30] By contrast, the percentage of minority journalists working at U.S. newspapers only amounts to 12.1 percent of the workforce.[31] Statistics such as these demonstrate that, among media businesses, the broadcasting industry has produced a record that few industries can match. Such careful analysis of the *real jobs held by real people* belies any unsubstantiated rhetoric proffered to justify re-regulation based on a need to prevent discrimination through the alleged self-replication of supposedly homogenous employee groups. For this reason, re-regulation here would be arbitrary and capricious.

Even if statistical analysis had shown the industry to be less integrated, which it does not, any attempt to establish a target level of representation for any group within society would amount to a quota system that would again entangle the Commission in precisely the same equal protection defects that led the Court of Appeals to find that the Commission's former EEO rules were unconstitutional in *Lutheran Church*.[32] Therefore, "underrepresentation" alone is an insufficient basis for the imposition of remedies.

30 Incorporated in the record of this proceeding as Appendix A to AWRT's comments, at 1.

31 Travis Loop, *Workforce*, Presstime (Publication of the Newspaper Association of America, Inc), May 2002 at 48.

32 *See* Associations' Comments at 39-43.

(3) Broadcasters Have a Strong Interest in Inclusive Hiring Practices, Making New Regulations Unnecessary

As operators of ongoing businesses, broadcasters are embracing workforce diversity because, in an increasingly multicultural, multiracial and multi-ethnic America, stations need trained, talented and skilled employees to produce, deliver and sell their products (generally, programming and advertising), and must attract audiences for these products from this increasingly multifaceted society. As in any business, performance counts. In the demographic setting facing today's broadcast industry, those who discriminate will have a more difficult time succeeding in the marketplace because they lose out on staffing, audience and commercial sales opportunities – and, as a result, limit their performance. It is a matter of simple marketplace economics favoring inclusive rather than exclusionary practices. Such realities belie arguments, such as those made by MMTC, that the nation's increasing diversity increases the need for re-regulation to prevent discrimination;[33] current demographics make broad outreach a *business necessity*.

Moreover, purely legal developments have rendered such diversity-based claims unsupportable as a rationale for FCC re-regulation *today*. As more fully discussed in the Associations' Comments,[34] the FCC itself did not rely on, or even mention, this diversity rationale in the *Second NPRM* in this proceeding, nor did it do so in briefs defending its former rules in *DC/MD/DE Broadcasters v. FCC*, 236 F.3d 13, *reh'g & reh'g in banc denied*, 253 F.3d

33 MMTC Comments at 50, citing to a 1946 FCC publication to support its claims that diversity serves as a legitimate basis for re-regulation.

34 Associations' Comments at 30-34.

732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002) ("*Broadcasters*"), in the wake of *Lutheran Church*.

As neither the actual behavior of the broadcasting industry, nor the Commission's own stated policies support re-regulating for diversity's sake, and case law makes it clear that Constitutional problems would arise should the Commission re-regulate with reliance on diversity as a rationale, the Commission should pay no heed to such diversity arguments.

(4) FCC EEO Rules Are Not Required by Statute

Although some Commenters suggest that aspects of the EEO Rules are required by statute,[35] as noted in the Associations' Comments, no such requirement exists. Indeed, the Court of Appeals found no statutory bar to vacating the Commission's former EEO regulatory structure, and the Commission itself then found no statutory bar to suspending those parts of the former rules that the court did not vacate, otherwise it could not have suspended them in good faith. Congress could have stepped into this breach and taken any action to impose such a mandate, but it did not do so – despite the two suspensions of the rule arising from judicial review in *Lutheran Church* and *Broadcasters*.[36] These statutory claims, therefore, carry little credence.

III. Critics of the Associations' Proposal Ignore Salient Facts

The Associations have proposed that, if the Commission believes it needs to re-regulate, Internet-based recruiting serve as the centerpiece of any future EEO regulation.[37] Under this plan, a station could ensure that it is in compliance by relying on Internet-centered recruiting to

35 *See* AFTRA Comments at ¶9 and NOW Comments at 28-29.

36 *See* Associations' Comments at 31.

37 Associations' Comments at 54-56.

disseminate at least half of its job openings. Job searching and recruiting on the Internet serve the underlying goals of such traditional outreach techniques as job fairs that have been at the core in EEO compliance: prospective employees can gather information about possible employers and have an opportunity to create a positive first impression on potential employers. The Internet offers an additional advantage because many more people can participate in an Internet-based job fair than a traditional job fair because they are relieved of the need to travel or take time off from the jobs they may already have. Job seekers set the schedule to meet their needs, rather than the needs of the organizers of the job fair.

It is this combination of expanded reach and expanded ease that makes Internet-centered job fairs so powerful as job search and recruiting tools – so much so that the Federal Government itself is expanding its use of such recruitment techniques. As noted, over a five-day period in April, "the government's first virtual information technology job fair garnered at least 1.8 million hits and more than 20,000 applications" for 250 job openings.[38] The online job fair approach proved so popular with applicants that the "'Monday workload exceeded the capacity of our system,' an OPM official said. 'We added two additional servers Monday evening, and again on Tuesday the workload continued to be extremely heavy and again exceeded the capacity. We added servers on Tuesday as well.'"[39]

Even in the face of such success stories, many proponents of re-regulation continue to oppose the Associations' simple-to-administer proposal that, if the Commission decides to re-regulate, it must limit the rule to broad outreach measures designed to ensure that anyone interested in a broadcasting career has the information available to find job openings and apply

38 *Virtual job fair nets 1.8 million hits, 20,000 applications, supra* n.6.

39 *Id.*

for them. The Associations' plan, fully discussed in the Associations' Comments[40] would, in a nutshell, meet this goal by requiring stations to: (1) post at least 50 percent of their full-time job openings on a web site and promote the web site as a source of job opportunity information; (2) notify referral organizations of at least 50 percent of their full-time job openings and announce on-air how referral organizations can receive job postings. The proposal would also allow stations to use such qualified third party organizations as the Associations to both distribute and promote job postings. Stations would be required to file certifications of the facts of their efforts to comply with these rules every four years.

Those who oppose this Internet-centered approach to recruiting outreach ignore *today's* job search and recruitment realities. These unfounded and legally suspect, non-empirical assertions include: (1) the "digital divide" militates against reliance on Internet recruiting;[41] (2) Internet recruitment lacks the personal touch and is, therefore, too passive; [42] (3) middlemen from minority communities are required to ensure sufficiently broad outreach; (4) Internet-centered recruiting does not overcome any skill gaps that limit broadcast employment,[43] (5) the Associations' plan would not lead to truly broad outreach; and, (6) the Commission needs its own EEO rule because reliance on such expert agencies as the EEOC produces unsatisfactory results.[44] As will be demonstrated below, these assertions are without merit, and the

40 Associations' Comments at 54-56.

41 *E.g., Comments of the American Federation of Radio and Television Artists*, filed Apr. 15, 2002 ("AFTRA Comments") at ¶ 32; MMTC Comments at 112.

42 MMTC Comments at 105.

43 MMTC Comments at 113-114.

44 MMTC Comments at 46. *See also* AFTRA Comments at ¶21-23.

Commission should reject them in order to meet its obligation to base rule making on a rational connection between the facts found and the choices made.

(1) Bridges Now Span the Digital Divide

Re-regulation advocates seem to overlook the most significant facts about Internet use. Internet use is greatest among those most likely to be looking for broadcasting jobs. This is especially true for those at the start of their careers who may lack industry knowledge. Thus, when re-regulation proponents such as NOW claim that "almost half of all Americans" would be excluded by Internet-centered recruitment, they mischaracterize both the facts (about three-fifths of all Americans now have Internet access)[45] and the nature of the issue. The measure of "all Americans" that re-regulation proponents offer also includes those who are not likely to be launching broadcasting careers, such as retirees and those now approaching retirement age. Such people, who now make up 21 percent of the American population,[46] are also the least likely to use the Internet, or even to have use for job search capabilities whether Internet-based or traditional. The Commission should, then, focus and analyze data regarding those who actually will be seeking jobs. Such an analysis would show that the Internet provides the best means to reach the greatest number of qualified people from all segments of society – which is, ultimately, the only legitimate goal here.

Assertions that minorities may be excluded from Internet-centered recruiting efforts are simply not true. As noted in the Associations' Comments, minorities and lower-income Americans, who have traditionally been less likely to have Internet access, are now adopting

45 *See* data cited in Associations' Comments at 43-46.

46 Source: U.S. Census Bureau data from the 2000 Census, available at <http://www.census.gov/population/pop-profile/2000/chap02.pdf> (visited May 17, 2002).

Internet technology at a rate that is growing 50 percent faster than it is for those groups more likely to have been early adopters of this technology.[47] With growth rates on such an upward trajectory, the idea of a digital divide is becoming as outmoded as fears of a Soviet threat.

Claims by re-regulation advocates that the "nation lacks universal Internet service"[48] are also red herrings. The nation also lacks universal newspaper subscriptions. But those interested in finding jobs can still read the want ads for free at the public library, a community center, or state employment service office – places where people can also find free Internet access to assist in their job hunting. The point is that any recruitment method, whether traditional or Internet-centered, will require a certain amount of personal initiative on the part of persons seeking a job. Indeed, in the fast-paced and often competitive world of broadcasting, such skills as initiative, perseverance and overcoming obstacles are important qualities for success. The goal here is not to deliver personal invitations to as many people as possible, but to find ways to create the greatest possible outreach and, in so doing, create the widest field of opportunity. As noted, the industry has significant economic incentives to avoid overlooking any untapped pool of talent – and the Internet is demonstrably the best means to leave no stone unturned in the competitive enterprise of attracting talent. As the Federal Government itself found out so dramatically with its recent first-ever online job fair, in today's world, an Internet based recruitment effort will yield a greater number of real people seeking real jobs and in so doing, will draw "talent from a broader talent pool. . . ."[49] For this reason, if the Commission finds a need to re-regulate, it

47 Source: U.S. Department of Commerce, Economics and Statistics Administration and National Telecommunications and Information Administration. *A Nation Online: How Americans Are Expanding Their Use of the Internet*, Executive Summary at 1 (Feb. 2002).

48 MMTC Comments at 112-113.

49 *Virtual job fair nets 1.8 million hits, 20,000 applications, supra* n.6.

should adopt the Associations' plan to make Internet-centered recruiting the means to assure station compliance with FCC Rules.

(2) Internet-centered Job Searching/Recruiting Is Ultimately as Personal as Any Traditional Recruitment Method – and Gives Applicants Greater Control

MMTC incorrectly characterizes Internet-centered job searching/recruiting as "impersonal," and contrary to the needs of "a people-based business like broadcasting" for the "personal touch."[50] In fact, Internet job searching/recruiting is even better than the traditional job fair. At a job fair, hundreds or even thousands of potential candidates may stop by an employer's booth. Employer representatives will take resumes from potential employees. But, ultimately, resumes will be reviewed later – outside the hustle, bustle and distractions of a busy job fair, just as they are when submitted online. Only after this later review will an applicant be called as part as a telephone interview or as a prelude to a personal interview – either way, the "personal touch" is made. While it is true that at a job fair a potential employer can identify certain racial, ethnic and gender characteristics of some candidates, job seekers can just as effectively signal how those attributes will help an employer through online submissions such as resumes, cover letters or even audio, video and photographs. Prospective students to colleges and universities throughout America have no difficulty using the application process (now often carried on over the Internet) to impress schools with their qualifications, including how they will add to the overall diversity of the school. There is no reason why a prospective employee cannot similarly use an Internet posted job opening to impress a station with his or her qualifications, including how he or she will add to the overall diversity of the station's personnel. Indeed, such

[50] MMTC Comments at 105.

submissions represent an opportunity to present a more meaningful pitch to a prospective employer than a few rushed moments spent at a job fair. Moreover, an applicant has only one opportunity to make a first impression. A well-conceived response to a posted job opening allows the applicant to better control the nature of the first contact in preparation for a follow-up personal meeting, whether first conducted over the telephone or in person. All in all, even where the initial contact is via the Internet, the overall process will be just as personal as a traditional job fair, with the added benefit of giving applicants better control over the process. Therefore, any assertions that the Association proposal would be too impersonal are without merit.

(3) The FCC Has No Justification for Requiring the Use of Middlemen

Under former EEO rules, broadcasters often contracted with such outside parties as diversity consultants and nonprofits to ensure compliance. The Associations' simple-to-administer plan would eliminate the need for such middlemen, even though many licensees may continue to utilize such services for business reasons. But for many re-regulation advocates, voluntary use of such intermediaries is insufficient; they want to require that stations use them.

The NAACP, for instance, includes a half-page list of types of minority-owned contractors or focused nonprofit organizations that should be required as a means to legitimize the breadth of any broadcaster's recruiting outreach.[51] MMTC claims that such businesses and nonprofits serve as means to build confidence, so job applicants can know "whether the company's personnel practices have been independently reviewed and endorsed by someone the person knows and trusts."[52]

51 Comments of National Association for the Advancement of Colored People, filed Apr. 15, 2002 at 3.

52 MMTC Comments at 116.

As a threshold matter, we reject the premise that minorities and women refuse to seek careers in broadcasting because of some fear of discrimination. None of the advocates of re-regulation has demonstrated that fear of supposed discrimination prevents motivated people from seeking jobs in the broadcasting industry. Lacking such evidence, there can be no legitimate rationale to impose such requirements on an industry – particularly one, such as broadcasting, that today has an excellent record of providing equal employment opportunity.

The Commission should fully understand the implications of such proposals. If the FCC imposes such a requirement, who will regulate these paid intermediaries? Who will control their rates? What services will they provide for such payment? Will stations be required to hire these organizations to conduct some yet undetermined type of evaluation in order that these organizations are in a position to grant "seals of approval" so that prospective employees will feel "comfortable" working for the station?

Ultimately, the use of such intermediaries is as unnecessary as it is problematic. The realities of the job market demonstrate that job seekers have many means to determine the culture of any workplace. They can take advantage of the many research tools available free on the Internet or at public libraries. Many fraternal, ethnic or other groups provide service agencies that can also advise potential job seekers or put them in contact with a mentor who already knows the inside "scoop" on various employers. Job seekers can also ask current or former employees.

The fact of the matter is that broadcasters have a business interest in assisting efforts to develop the talent pool they need to flourish – but the government should not be used to sanction intrusive and unnecessary involvement by outside groups. Given the structure of job hunting and recruiting *today,* the Commission has no justification for imposing rules on the broadcast

industry that today, as demonstrated, is widely recruiting and hiring people from all segments of America's increasingly multicultural and multiracial society.

Additionally, efforts, such as those of the Associations, to establish hyperlinks to and from various and diverse professional sites, can serve to link particular constituencies to the broadcast industry. Unfortunately, some sites, such as that of the National Association of Black Journalists,[53] have rebuffed all efforts to establish cross-links to NASBA CareerPage.com. In some cases, civil rights and advocacy organizations, which should be at the forefront of making job information broadly available to their constituencies, have instead entered into sponsorship arrangements with profit-making sites to drive their members and constituents to view want-ads on these for-profit sites.[54] Others, such as the NAACP or NOW, have no job recruiting links at all on their home pages, even though MMTC states that employers would "gladly post job vacancies in confidence" with these organizations.[55] Although the Internet makes transactions of all kinds more efficient by removing middlemen from the process, some seek FCC rules tending to encourage continued reliance on such middlemen – and the expenses they add to the process. The Commission should decline this invitation because enforced inefficiency is not in the public interest, nor is it justifiable in the absence of a demonstrable industry problem in need of remediation.

53 The National Association of Black Journalists is part of the MMTC-led coalition calling for re-regulation.

54 *E.g.,* the National Urban League's arrangement whereby those who click on an Urban League homepage button, "Career Center," are instantly linked to Monster.Com. *See* <http://www.nul.org>.

55 MMTC Comments at 109.

(4) Even Without Government Mandates, The Broadcast Industry Is Engaged In Workforce Development Initiatives such as Training and Education Because It Requires a Skilled and Educated Workforce

Some commenters complain that an Internet-focused recruiting obligation would diminish broadcaster-sponsored educational and training opportunities.[56] However, even in the absence of EEO requirements in the wake of court rulings over the past three years, the Associations and their members have increased their support for broadcasting-related education and training. Indeed, such support has a long history – and is a well-rooted part of industry culture. These efforts, well described in the Associations' Comments,[57] are not just models of community relations, but also represent a business imperative for broadcasters. The industry needs skilled and qualified employees from all segments of society. The best way for the industry to meet its employment needs in the future is to invest in the workers of the future. Given the increasingly diverse nature of American society, broadcasters are eager participants in efforts to ensure that no pool of talent goes untapped. Given this track record and the industry's continuing needs for skilled employees, the Commission has no valid grounds for imposing training obligations on the broadcast industry. The broadcasting industry will continue to fund such efforts as a means of ensuring its own future.

56 MMTC Comments at 113-114.

57 Associations Comments at 15-21 and exhibit A attached thereto.

(5) Re-Regulation Advocates Propose Unnecessary Regulatory Complexity Without Added Benefit; The Associations Offer Simple-to-Administer Guidelines that Apply to Everyone

In their support of rules that include multi-faceted compliance menus and exemptions, [58] and the concomitant expenditure of both government and private resources required to administer such a complex scheme, re-regulation advocates offer nothing that would improve upon the proven outreach ability of the Internet for job search and employer recruiting efforts.

By contrast, when a large menu of compliance options is put in place, the Commission must justify the credit(s) it gives to one form of outreach rather than to another. Moreover, each station must be ready to document the multiplicity of activities contemplated under such a menu of options. This implicit, if not explicit, requirement would be burdensome and would inevitably involve the FCC in prolonged and costly fact finding and decision-making on such issues as: what does a station need to do to be eligible for a credit; what type of evidence should a station be expected to retain and for how long to prove its eligibility; what type of evidence will be found, in a particular contested proceeding, to be adequate to support a credit for a particular activity. In short, a menu approach enormously complicates matters and increases the opportunity for disputes and the cost for governmental regulation in this area. With a simple broad Internet-centered job search and recruiting system, as offered by the Associations,[59] both the Commission and licensees will know with certainty whether a station has complied.

58 *See, e.g.*, MMTC Comments at 87-96, which offers several scenarios for exemptions, and well demonstrates the complexity involved in administering such programs.

59 Associations' Comments at 54-56.

In its *ex parte* presentation to Commissioner Copps,[60] MMTC criticized the Associations' proposed rule requiring non-exempt stations to post at least 50% of their full-time job openings on the Internet, advertise their use of the Internet to post jobs, and provide referral sources with information about job openings. But, the Associations proposed an initial 50% requirement to make the both administration and compliance simple and straightforward. At the 50 percent level, the smallest of the non-exempt stations should be able to comply even if they only post a handful of jobs every year. The Associations' plan was also designed to reduce the need for stations to seek exemptions and eliminate much of the litigation that often follows exemption or waiver requests. History teaches that exceptions are inherently subject to misunderstanding and dispute, thereby creating uncertainty and burdening the resources of both the FCC and licensees. Common sense, however, supports the notion, as fully described in the Associations' Comments, that stations will likely well exceed the minimum for Internet job postings. This will occur as stations attempt to preserve their allotment of non-posted job openings for those instances when business necessities truly require such an approach. No licensee wants to rely upon exceptions and then be forced to justify them– including all the scrutiny and disclosures such justifications entail.

In short, the fear of public and FCC scrutiny will push up the percentage of postings quite significantly, without the need for the FCC to adopt an inflexible governmental regulation mandating an unrealistic percentage. If the Commission, based on accumulated experience, were to conclude that the percentage should be raised sometime in the future, there is ample opportunity to do that based on a newly developed factual record.

60 Letter of David Honig, Esq., *supra* n.24.

(6) Expert Agencies Charged Directly with Enforcing Civil Rights Laws Are Effective and Should Take the Lead in Enforcement

Although some commenters assert that the Equal Employment Opportunity Commission ("EEOC") is ineffective and, as a result, the FCC should step into the breach,[61] review of EEOC statistics demonstrates that the agency is producing results. In fiscal year 2001, the "private sector pending inventory of charges (backlog) decreased by five percent from the previous year to 32,481 – the lowest level in nearly two decades. The average charge processing time for private sector charge filings stood at 182 days – a 34-day decline from FY 2000 and the lowest level since the early 1980s. The average time to resolve a charge through voluntary mediation was 84 days - a drop of 12 days from the prior year. The merit factor rate (charges with meritorious allegations and/or outcomes favorable to the charging party) increased to 22 percent – the highest level since the early 1980s."[62] Even if the failure of other government organizations to do their jobs properly gave the FCC grounds to step into the breach, which it does not, the real data – rather than hunches or innuendo – belie any claims that the EEOC does not provide protection against actual discrimination. Therefore, the FCC should rely on such expert agencies as the EEOC as well as state agencies and the courts to resolve complaints and, only after such adjudication, should it consider action against FCC licensees. It need not duplicate other government efforts that have proven effective.

61 *E.g.,* MMTC Comments at 46 and AFTRA Comments at ¶21-23.

62 EEOC Issues Fiscal 2001 Enforcement Data, News Release (Feb. 22, 2002), available at <http://www.eeoc.gov/press/2-22-02.html> (visited May 17, 2002).

IV. The FCC Should Consider All Relevant Issues in the Rule Making and Not Create A Separate Proceeding to Determine the Future of Employee Profile Reports

MMTC has suggested that the Commission sever consideration of any EEO employee profile reporting requirements from this proceeding and, instead, establish a separate proceeding to determine the future of the FCC's Form 395.[63] Such severance, however, would be arbitrary and capricious as resolution of that issue is inextricably intertwined with the core issue in this proceeding: how, if at all, should a broadcaster's conduct be regulated. Severance of this subject is like saying to the Commission: "Let's only talk about what the rules should say and later we will discuss how they should be implemented and enforced." Such an approach evades the key issues under dispute, which is the scope of any EEO obligations and the means by which such obligations are enforced. This is especially true because, as noted, the Associations and their opponents in this proceeding agree that discrimination is illegal and pernicious.

As noted above, the imposition of any rule that requires the filing and public disclosure of employee profile reports, on a station attributed basis, runs afoul of binding constitutional precedent because, even if the Commission does not use information from the reports in enforcement actions, outside groups have historically used them – and pledge to continue to use them – to pressure licensees to hire more members of specific groups. Such requirements would run afoul of the D.C. Circuit's clear holding in *Lutheran Church.*

Rather than avoiding the core issue and the constitutional problems it raises, the Commission should instead do what is constitutionally required: reject requirements for publicly-available, station-attributed reporting because such measures lead to unconstitutional pressure.

63 MMTC Comments at 135-136.

In taking the principled road, the Commission will bring closure to this four-year-old proceeding, rather than extend it for, perhaps, several years by opening a new inquiry or rule making. The record is now complete. The time has come for finality.

CONCLUSION

The Associations have shown, and the record evidence is not to the contrary, that the FCC's authority to re-regulate in this area is highly questionable. If the Commission nevertheless chooses to re-regulate, the Associations' Internet-centered job search/recruitment proposal is the best hope for the Commission to create a constitutional race and gender neutral program to meet the goal of helping find *real jobs for real people.*

Respectfully submitted,

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California Broadcasters Association,
Colorado Broadcasters Association,
Connecticut Broadcasters Association,
Florida Association of Broadcasters,
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Hawaii Association of Broadcasters,
Idaho State Broadcasters Association,
Illinois Broadcasters Association,
Indiana Broadcasters Association,
Iowa Broadcasters Association,
Kansas Association of Broadcasters,
Kentucky Broadcasters Association,
Louisiana Association of Broadcasters,
Maine Association of Broadcasters,
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Massachusetts Broadcasters Association,
Michigan Association of Broadcasters,
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Rhode Island Broadcasters Association,
South Carolina Broadcasters Association,
South Dakota Broadcasters Association,
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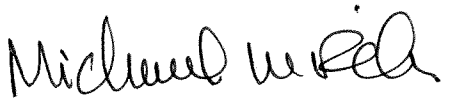
By: 

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May 29, 2002

Document #: 1237176 v.11